No. 11063

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD ROLAND HAUGEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the Eastern District of Washington, Northern Division

Reply Brief

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TABLES OF CASES

TABLE OF CASES—Continued

STATUTES

ASSIGNMENT OF ERROR NO. 4

Former Jeopardy

Without waiving the other errors assigned, we devote this brief to replying only to that portion of Appellee's Brief which deals with the question of former jeopardy by reason of the opinion of the Court which found the evidence was insufficient and directed the dismissal of the case against the appellant. This portion of appellant's brief commences on page 13 and ends near the top of page 15. It is headed as follows:

> "III. Discussion of Appellant's Third Assignment of Error, viz., That the Court's Memorandum Decision was a Final Judgment of Dismissal."

This heading is misleading. Appellant's Assignment of Error therein discussed was not his third but his fourth assignment. The assignment was not limited to the contention that the Court's Memorandum Decision was a Final Judgment of Dismissal. It embraced and included a contention that the Court erred in overruling the objection to the introduction of further evidence, after his written opinion finding for the defendant on the insufficiency of the evidence, and that in doing so the Court placed the defendant in double jeopardy in violation of his constitutional rights.

The assignment of error which appellee's counsel

discusses under his own heading, wording it as above, is worded on pages 15 and 16 of Appellant's Brief as follows:

"ASSIGNMENT OF ERROR NO. 4

> "The District Court erred in overruling defendant's objection to the introduction of further testimony after the written opinion of the Court filed December 22, 1944, stating, 'The action must be dismissed,' as follows:"

This is followed by setting out that portion of the record wherein Mr. Sandvig, appellee's counsel at the trial, clearly raised the question of former jeopardy by reason of the trial which terminated in the Court's opinion finding that the action must be dismissed.

None of the cases cited in Appellee's Brief meet the contention which is here made. None of them deal with the constitutional right of the defendant not to be placed twice in jeopardy for the same offense. This may possibly explain counsel's attempt in the heading of his discussion to narrow this assignment to a mere technical contention, which ignores the broad constitutional question raised by the actual assignment made.

A mere reference to the authorities cited on pages 14 and 15 of Appellee's Brief is sufficient to show that they have no application to the situation presented here.

Title 18, Section 688, U. S. C. A., and the Rules of Criminal Procedure for District Courts cited as authority for "the matter of reopening a criminal case for reception of further evidence before the entry of judgment, either of dismissal or guilt," contained no reference to such reopening. The section merely deals with the power of the Supreme Court to prescribe rules of practice and procedure with respect to proceedings after verdict or finding of guilt; and the rules which follow this section do not in any way refer to the reopening of a case after a verdict or finding, or to the introduction of evidence after such verdict or finding. Even had they done so, the constitutionality of such rules would have been highly questionable had they undertook to authorize such a procedure after a verdict or finding of not guilty.

People v. Grana, 36 Pac. (2d) 375 (Calif.), was a case where the defendant was found guilty by the trial court at the conclusion of the evidence. It merely held that the opinion of the Court did not control his former judgment of conviction. There was no finding by the trial court that the evidence was so insufficient as to compel a dismissal, nor was there any reopening of the case for the introduction of further evidence after the conclusion of the trial. The sentence imposed on the defendant in that case, moreover, was reversed on other grounds.

City v. Norwich, 274 Fed. 374, was an admiralty case, in which the Court had filed an opinion and dismissed the case. His holding that he had a right to reopen the case for the introduction of further evidence involved no question of constitutional right.

Rogers v. Hill, 289 U. S. 582, merely holds that the Circuit Court did not direct a dismissal in its mandate which reversed an interlocutory order for an injunction.

McGhee v. Leitner, 41 Fed. Supp. 674, holds that where a final decree is entered, the appeal is from that and not from the Court's opinion.

Rothschild and Company v. Marchall, 44 F. (2d) 546, is merely to the effect that a decree when entered cannot be governed by an opinion.

First National Bank of Graham v. Weitzel, 239 Fed. 497, holds that an opinion cannot take the place of formal findings on an appeal from a final judgment.

Lahman v. Burnes National Bank, 20 F. (2d) 897, holds that a judgment for a party cannot be reversed where there were no findings of fact and none requested. The following statement taken from the opinion in that case, p. 898, is authority for the position taken by appellant in this case:

> "A general finding in favor of the party is treated as a general verdict."

Uhl v. Dalton, 151 F. (2d) 502, is a case in which an appeal was sought to be taken from an opinion of the Court in which the Court had declared that neither party was entitled to judgment and ended his opinion with the words, "It is so ordered," as Judge Mathews properly commented, p. 503.

> "Thus, instead of directing the entry of a judgment, the Court, in effect, directed that no judgment be entered."

None of the cases cited by appellee's counsel were criminal cases except the first, a California case, and that did not involve the constitutional question of double jeopardy.

Our contention is that the opinion of the Court was a general finding of not guilty by a reason of the insufficiency of the evidence presented to him in the course of a trial. His finding of not guilty was so strong that he concluded it with the words, "Therefore, the action must be dismissed." His finding was the equivalent of a verdict of not guilty.

It is a general finding, of course, but the law does not contemplate that formal Findings of Fact and Conclusions of Law should be entered by the Court in the trial of a criminal case, nor does it contemplate or require a formal judgment to give efficacy to a

verdict of not guilty, or to a finding of not guilty. It may comport more with the dignity of a Court and with the proper keeping of its records that a formal order of discharge should be entered when a jury finds a defendant not guilty, or when a court finds him not guilty, but it cannot destroy the efficacy of a verdict of not guilty, or a finding of not guilty, if such an order be not entered. The verdict of not guilty by a jury protects the defendant from another trial for the same offense, regardless of whether or not the Court follows it with an order of discharge, or dismissal, or judgment.

Our Supreme Court passed squarely upon this point in the case of *Ball v. United States,* 163 U. S. 662, 41 Law Edition. In that case a verdict of not guilty was rendered on Sunday, and an order of discharge was entered on Sunday as to one of the defendants. It was held that the order was void as being entered on Sunday, but that the defendant could not again be tried. The Court on page 671 said:

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same

offense. United States v. Sanges, 144 U. S. 310 (36; 446); Com. v. Tuck, 20 Pick. 356, 365; West v. State, 22 N. J. L. 212, 231; 1 Lead. Crim. Cas. 2d ed. 532.

"For these reasons, the verdict of acquittal was conclusive in favor of Millard F. Ball; and as to him the judgment must be reversed, and judgment rendered for him upon his plea of former acquittal."

A reading of the trial court's oral opinion on this point in this case shows that he was under the misapprehension of believing that it was necessary even in jury cases for him to enter an order when the jury returned a verdict of not guilty, and that the only thing lacking so far as his finding of not guilty in his former opinion was concerned, was a formal order of dismissal.

In this connection the Court said:

"The jury returns a verdict of not guilty. That does not release the defendant. I have to sit here and say that the defendant is released and his bond discharged, or he is released from custody, and the Clerk makes an entry of that order.

"In some more formal cases it might be deemed advisable for me to sign an order, after the jury has returned a verdict. At least there must be some action on the Court's part, and so that here when I said it must be dismissed, it seems to me in the logic of the situation I would construe that order of dismissal on the facts as I outlined them at the time I wrote the opinion would have to be entered." (Tr. 179)

It is obvious that the Court in this ruling had more

regard for the form than to the substance. It is obvious also that he was mistaken when he concluded that it was necessary for him to make an order of discharge or dismissal upon the verdict of a jury. In so far as the constitutional protection of defendant against double jeopardy is concerned, whatever may have been the desirability of clearing his records with respect to the release of the defendant and the exoneration of his bond bail, no such order was necessary. He was here concerned not with such lesser technical matters, but with a high constitutional right, with which the defendant is clothed when the verdict is rendered or finding made, which no order or lack of order or action on his could divest from the defendant.

In *People v. McGrath*, 96 N. E. 92, the defendant was found guilty of murder in the second degree on an indictment charging him with "guilty of murder in the first degree." His counsel, under pressure by the court, moved to set the verdict aside. Counsel then tried to withdraw this motion, but the court erroneously refused to allow him to do so and granted the motion and set the verdict aside. He was again brought to trial, and in sustaining his objection to being placed twice in jeopardy, the Court on pages 95-96 said:

"A plea of autrefois convict under the third

subdivision of this section would not have been strictly appropriate in the case at bar, as no judgment had been rendered on the first verdict. The guaranty against twofold jeopardy, however, being a constitutional right, any objection on the record which clearly raises that issue at the outset of the second trial is sufficient as a plea in bar. 'The doctrine that a man once tried and convicted, or acquitted of a crime on a valid indictment by a court of competent jurisdiction, cannot be tried again for the same offense, has its foundation in the principles of justice, and is a very ancient doctrine of the common law. It is embodied in that provision of the Constitution of our state (article 1, sec. 6) which declares that "no person shall be subject to be twice put in jeopardy for the same offense." In the application of this constitutional principle, it is well settled that an acquittal or conviction by verdict of a jury, although not followed by judgment or sentence, is an acquittal or conviction which protects an accused person against another trial, provided there was a competent court and a lawful indictment, or, in case of conviction, so long as the judgment remains unreversed.' People v. Cignarale, 110 N. Y. 23, 30, 17 N. E. 135, 142. At common law a judgment was not necessary to support a plea of autrefois convict. This appears from the statement of Sir William Blackstone to the effect that the plea of a former conviction for the same identical crime is a good plea in bar, though no judgment was given or perhaps ever will be, as when suspended by the benefit of clergy or some other cause. 4 Blackst. Com. 330."

It has universally been held that the finding or findings of the Court in a case tried without a jury is equivalent to and has the same effect as the verdict of a jury.

Motter v. Wallace, 72 Fed. Rep. (2d) 678, 680;

McPherson v. Cement Gun Co., 50 F. (2d) 889, 890.

It has also been held that such findings may be general or special, and where a general finding is made it too has the same effect as the verdict of a jury.

In *Globe Indemnity Co. v. Southern Pac. Co.,* 30 F. (2d) 580, the Court on page 583 said:

> "It is suggested in the brief of defendant's counsel that the District Court should have made special findings. This was unnecessary, and its general finding had the effect of a verdict of a jury. Vicksburg, etc., Ry. Co. v. Anderson-Tully Co., 256 U. S. 408, 41 S. Ct. 524, 65 L. Ed. 1020; Compania Transcontinental de Petroleo v. Mexican Gulf Oil Co. (C. C. A.) 292 F. 846."

In *O'Keefe v. Pearson,* 73 F. (2d) 673, the Court on page 676 said:

> "The verdict or general finding of the District Court in favor of the plaintiff included findings of all facts essential to the verdict, including one to the effect that the defendant was the real owner of the stock, if there was evidence from which such finding could be made. Allen v. Merrimack County Odd Fellows,' Mut. Relief Association, 72 N. H. 525, 527, 57 A. 922."

Meyer v. Everett Pulp & Paper Co., 193 F. 857, 863;

United States v. Feather River Lumber Co., 23 F. (2d) 936, 939.

In criminal cases, no provision is made in the law for special findings of fact and conclusions of law, nor need they be separately stated. The simple issue is, "guilty" or "not guilty," and the determination is always a general finding based upon the sufficiency or insufficiency of the evidence presented. That determination may be expressed in simple words, "I find the defendant not guilty," or it may go further and give strong and cogent reasons for the finding. It may analyze the evidence and demonstrate its legal insufficiency to convict, as the Court did in this case, and it may conclude with the strong words: "Therefore, the action must be dismissed." But whatever its wording, if it be a determination by the court, after the submission of the case to him, that the defendant cannot be found guilty, then it is a finding of not guilty, and the defendant cannot be tried again for the same offense.

To reopen the defendant's case for the introduction of further evidence after such a finding has been made, is to try him again, with the added disadvantage that the court can consider not only the new evidence presented against him, but that which was introduced in the former trial.

The action of the Court in permitting the case to be reopened and further evidence to be introduced demonstrates that he was fully convinced that the

evidence offered at the first trial was insufficient to convict. Having reached that determination after the conclusion of the Government's evidence and after the formal submission of the case to him by both sides and having announced it in writing—in other words, having found the defendant not guilty—he cannot again subject him to the jeopardy of a conviction in another hearing.

The constitutional guarantee against double jeopardy applies equally to trials by Courts, as to trials by jury, and its application is governed by the same principles. It has been so held.

In *Rosser v. Commonwealth*, 167 S. E. 257 (Va.), a nolle prosequi was entered after a trial had commenced before a judge. Defendant was again indicted, and was convicted, his plea of former jeopardy having been stricken by the trial court. In reversing this ruling, the Supreme Court of Appeals of Virginia on page 259, said:

> "It is a settled law, everywhere, that jeopardy means the danger of conviction. In so far as the accused is concerned, this danger exists and is just as real when he is being tried by the court without a jury as it is when he is being tried by a jury. We perceive no difference. Especially is this true in the case at bar, as the trial before the court had progressed to the extent that the commonwealth had introduced the testimony of some or all of its witnesses. A trial by a court without a jury affords the same protection to the

> accused to plead it in bar upon a second trial for the same offense as is afforded by a trial by a jury. In a trial before a court without a jury, the danger of conviction or jeopardy of an accused begins when the trial has reached the stage where the commonwealth begins to introduce its testimony. That stage in such a trial is equivalent to the swearing of the jury when the accused is tried by jury.
>
> "The Constitution empowering the court to try a criminal case without the intervention of a jury does not deprive the accused of any protection he would have had if tried by jury. He simply waives the jury trial; nothing else.
>
> "It was certainly not intended that in a trial before a court without a jury, the commonwealth, after introducing its evidence and finding it had failed to make a case against the accused, would be permitted to nolle prosequi the indictment and be entitled to subject the accused to another trial for the same offense. If this could be done, the accused would be liable to conviction for the same offense, in successive trials, subject only to the whim of the attorney for the commonwealth. This would violate the letter and spirit of the Constitution."

Here the prosecuting attorney did not nolle prosequi the case because of insufficient evidence. He went much further. He completed the trial; he rested his case: "Mr. Erickson: The Government will rest." (Tr. 137) He submitted a brief (Tr. 138). He invited and received a finding by the Court, and that finding was that his evidence was insufficient to convict. He placed the defendant in jeopardy until that finding was made. He cannot again place him in

jeopardy under the guise of a motion to reopen to introduce further testimony. The constitutional guarantee against double jeopardy is a fundamental right and cannot be so lightly frittered away.

In *Cornero v. United States,* 48 F. (2d) 69, after a jury had been empaneled, the prosecuting attorney asked for a continuance until the next calendar because two of his important witnesses who were under bond to appear were not present. The Court denied this request, and after a short continuance discharged the jury, but not the defendant. In sustaining his plea of former jeopardy, this Court on page 71 said:

> "The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses. It is uniformly held that, in the absence of sufficient evidence to convict, the dis-

> trict attorney cannot by any act of his deprive the defendant of the benefit of the constitutional provision prohibiting a person from being twice put in jeopardy for the same offense."

If a district attorney cannot deprive the defendant of his constitutional right by announcing the insufficiency of the evidence before the conclusion of the trial, *a fortiori* he cannot do so after its conclusion, either by announcing it himself, or having the court announce it when the case has been submitted for his decision.

In *Clawans v. Rives*, 104 F. (2d) 240, where a defendant was charged with disorderly conduct, and a witness was examined for the prosecution before a magistrate, the prosecutor had a nolle prosequi entered, and sought to convict the defendant on a second information. The Court on page 242 said:

> "Attacking the validity of her conviction in Case No. 2, the appellant relies upon the Fifth Amendment to the United States Constitution providing that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Under the facts stated the appellant was put in jeopardy in Case No. 1. Jeopardy attaches in a case without a jury when the accused has been subjected to a charge and the court has begun to hear evidence."

In *People v. Collins,* 265 N. Y. S. 475, a defendant was arrested and placed on trial before a magistrate for disorderly conduct. After witnesses had testified,

the magistrate stated that he had observed among the papers before him a notation that the defendant had prior convictions, and being fearful that it might influence his decision, he declared a mistrial. "The magistrate neither dismissed the case nor discharged the relator, but instead remanded her for the purpose of a retrial" (p. 477). Further, the Supreme Court on page 477 said:

> "It is clear that the magistrate did not intend to discharge the prisoner, for, if he directed that the action be dismissed, it would have been necessary to discharge the relator. The court stated that it was his desire to have another magistrate hear the case, since what he observed 'might be of a prejudicial nature against the defendant.' To this counsel for relator refused to consent, and requested that the court continue with the trial."

With respect to the plea of former jeopardy, the Court said:

> "When a defendant is charged with disorderly conduct under section 722, Penal Law, or sections 1458 and 1459 of the Consolidation Act, the magistrate before whom the trial proceeds has summary jurisdiction to render a judgment of acquittal or conviction. Having once commenced the trial of a defendant upon such a charge, and having sworn a witness, the trial could terminate only either by an acquittal or by a judgment of conviction."

See also:

People v. Goldfarb, 152 App. Div. 870, 874, 138 N. Y. S. 62, 65, affirmed 213 N. Y. 664, 107 N. E. 1083.

Ex parte Ulrich, 42 F. 587, is an opinion written in 1890 by Judge Philips of the District Court of Missouri. It is a very learned opinion and discusses at length the authorities dealing with the fundamental right of the citizen not to be placed twice in jeopardy for the same offense. In that case Judge Philips released on *habeas corpus* a defendant who had been convicted in the State Court against his plea of former jeopardy. At the first trial, a jury was impaneled, and the trial judge discharging the jury on the ground that he, the Judge, was not well enough to proceed with the trial. In that case Judge Philips held, and supported his holding by numerous quotations from the Supreme Court of the United States, to demonstrate that the protection against double jeopardy does not spring alone from constitutional provisions, but is a right so fundamental that it is regarded as guaranteed by the common law to such an extent that it can be enforced by a federal court under the provisions of the 14th amendment, the 5th amendment not being applicable to the states. On page 590 quot- from Mr. Justice Miller, in *Ex parte Lange,* 18 Wall. 163, he said:

> "If there is anything settled in the jurisprudence of England and America, it is that no man

> can be twice lawfully punished for the same offense. * * * The principle finds expression in more than one form in the maxims of the common law. * * * In the criminal law the same principle, more directly applicable, * * * is expressed in the Latin, *'nemo bis punitur pro eodem delicto,''* or, as Coke has it, *'nemo debet bis puniri pro uno delicto.'* * * * The common law not only prohibited a second punishment for the same offense, but it went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.''

Can a right so fundamental be taken away from the defendant by a mere technicality? Can it be said that the finding of the Court, after the conclusion of the evidence, would have protected the defendant if the Judge had signed an order of dismissal or if the clerk had himself made an entry in the Court's journal, but that he is deprived of all protection if such purely technical and ministerial acts were not done.

We have already seen, from authorities cited, that the finding of the Court is equivalent to the verdict of the jury and that in jury cases, no order or judgment of the Court is necessary after the verdict to entitle the defendant to interpose his plea of former jeopardy. We have also seen that his consent to be tried by a judge instead of a jury waives none of his fundamental rights. When he is tried by the judge

and the judge finds that he is not guilty, he cannot again be tried without violating his constitutional rights.

The finding of the court of "not guilty" by reason of the insufficiency of the Government's evidence is contained in the concluding paragraph of his opinion:

> "Since the plaintiff has failed to present the best evidence available to it, I am forced to conclude that I should have sustained the objection to the introduction of such testimony. That being true, it is my duty now to disregard it. Without such evidence, plaintiff has failed to sustain its burden that the Olympic Commissary was an agency of the United States and that the counterfeiting of its meal tickets was calculated to defraud the United States." (Tr. 18)

"Therefore, the action must be dismissed" is an inevitable conclusion from the finding which the Court made in the concluding paragraph of his opinion.

It is the finding which constitutes his verdict, and no further ministerial act on his part or the part of his clerk is necessary to give efficacy and force to the plea of the defendant, that he should not ever again be placed in jeopardy.

No justification for such violation, even if justification would suffice, is presented in the record before the Court. The only ground presented by the dis-

trict attorney in his motion to reopen the trial is that he thought he had sufficient evidence. He "took his chance" and presented insufficient evidence. He admitted in his motion that the evidence which he presented on the second hearing was readily available, as is shown by the following excerpt from his motion:

> "Plaintiff further respectfully shows to the Court that the matter of securing a member of the Judge Advocate General's Department of the United States Army Engineers, who is familiar with the original prime contract referred to herein and in the Court's Memorandum Decision, and bringing such officer to Yakima as a witness is a comparatively simple matter; that the ends of justice would best be served, as the present lack of 'best evidence' as pointed out in the Court's Memorandum Decision, may be supplied in the manner requested herein." (Tr. 19)

If the procedure followed in this case should be sanctioned by the blessing of this Court, no defendant in the future who is desirous of protecting his constitutional rights or to a fair and orderly trial could safely waive a trial by jury. He would subject himself to a trial at which the district attorney could present part of his testimony, or all of it, and then ask for a continuance in which to supply the missing links. He could place the defendant on trial, present all of his testimony and after the Court had found it insufficient, ask for another trial to present other and further testimony. If he could do this once, he

could do it twice and so on, *ad infinitum*. He could try the defendant piecemeal and by a system of trial and error, regardless of constitutional provisions. Such a procedure is shocking to all sense of justice and fairness. There must be an end to litigation, and litigation in a criminal case ought to end when a verdict of "not guilty" is rendered or when a finding of "not guilty" is made.

Respectfully submitted,

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